84-1064

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN McNABB,

Petitioner,

v.

OREGONIAN PUBLISHING CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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December, 1984

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. Whether Summary Judgment is properly granted for defendant newspaper publisher on the question of malice in a defamation case where plaintiff police officer presents evidence of the following facts:

(1) Defendant's statements concerning plaintiff were false;

(2) Defendant had no first hand sources for any of its statements about plaintiff;

(3) Defendant failed to follow up on favorable information it received;

(4) Defendant failed to publish favorable information it had received concerning plaintiff;

(5) Defendant possessed information that one of its sources, in making derogatory statements, was actually describing someone other than plaintiff;

(6) There was absolutely no urgency

to defendant's publication, some of the information used being up to ten years old; and

(7) Defendant made no attempt to verify with plaintiff's immediate supervisors the charges it published against plaintiff, all of which were related to plaintiff's employment.

II. Whether a publisher-defendant in a state defamation action may rely on the first amendment protection of New York Times v. Sullivan while refusing under a state "shield law" to disclose evidence of "actual malice", which Sullivan requires plaintiff public official to prove.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT . .	14
1. The Oregon courts have decided an important question of federal law which has not been, but should be, settled by this Court	14
2. There is substantial conflict among the federal circuits and among the state courts as to the evaluation on summary judgment of "actual malice" in Sullivan cases	16
3. "Shield Law" - The Oregon courts have decided an important question of federal law which has not been, but should be, settled by this Court	19
CONCLUSION	21
APPENDIX INDEX	1a

TABLE OF AUTHORITIES

Cases — Page

JUDICIAL DECISIONS

Clark v. American Broadcasting Companies, Inc., 684 F.2d 1208 (6th Cir. 1982) 19

Guam Federation of Teachers Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.) cert. denied, 419 US 872 (1974) . . 17

Guitar v. Westinghouse Electric Corp., 396 F. Supp 1042 (SDNY 1975) 19

Hutchinson v. Proxmire, 443 US 111, 99 S.Ct. 2675, 61 L. Ed.2d 411 (1979) . . 14,15

Jenoff v. Hearst Corp., 453 F. Supp 541 (DMd. 1978) . 19

New York Times v. Sullivan, 376 US 254, 84 S.Ct. 710, 11 L. Ed.2d 686 (1964) 7,8,10,15,16,17,18,19,20,21

Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir. 1981) 19

Shultz v. Newsweek, Inc., 668 F.2d 911 (6th Cir. 1982) 19

Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir. 1979) 19

TABLE OF AUTHORITIES - Continued

Page

Truetler v. Meredith Corp.,
455 F.2d 255
(8th Cir. 1972) 19

Washington Post Co. v. Keogh,
365 F.2d 965 (DC Cir. 1966),
cert. denied, 385 US 1011
(1967) 16,17

Wasserman v. Time, Inc.,
424 F.2d 920, 922 (DC Cir.)
(Wright, J. concurring),
cert. denied, 398 US 940
(1970) 17

Yiamouyiannis v. Consumers Union,
619 F.2d 932
(2nd Cir. 1980) 19

Statutes

28 U.S.C. Section 1257(3) . . . 2

ORCP 47C 2,3

ORS 44.520(1) 4

ORS 44.530(3) 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN McNABB,

Petitioner,

v.

OREGONIAN PUBLISHING CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Oregon Supreme Court of September 18, 1984.

OPINIONS BELOW

The Oregon Supreme Court denied petitioner's Petition for Review of the decision of the Oregon Court of Appeals which affirmed the trial court's grant of summary judgment for defendant in this

case. The Oregon Supreme Court's denial of review is reported at 297 Or 824, (1984). The Oregon Court of Appeals decision is reported at 69 Or App 136, 685 P.2d 458 (1984). The trial court's decision is unreported.

JURISDICTION

The Oregon Supreme Court's denial of review was issued September 18, 1984. This court has jurisdiction under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The First Amendment to the United States Constitution provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance."

Oregon Rule of Civil Procedure 47 provides for summary judgment, in relevant

part, as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

ORCP 47C.

The Oregon "Shield Law" provides, in relevant part:

> "(1) No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise:
>
> "(a) the source of any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or
>
> "(b) any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public.
>
> "* * *

> "(3) The provisions of ORS 44.520(1) do not apply with respect to the content or source of allegedly defamatory information, in civil action for defamation wherein the defendant asserts a defense based on the content or source of such information."

ORS 44.520(1), 44.530(3).

STATEMENT OF THE CASE

Plaintiff, a Portland, Oregon police officer, brought this action to recover for damage to his reputation caused by an allegedly libelous newspaper article published by defendant.

The alleged libel, published on May 31, 1981, was one of a series of articles that examined the workings of the Portland Police Bureau. The article includes quotations that portray plaintiff as a racist. It is prefaced by a summary statement that plaintiff is reputed to be a racial bigot inclined to using excessive force against blacks. It then reports a meeting between plaintiff, Portland City

Commissioner Jordan and Portland Police Chief Baker, in which plaintiff was allegedly told by Commissioner Jordan that he was rumored to be "heavy handed" in his work in the North Precinct and that he used "racially demeaning" language. It attributes to an unidentified "white Portland attorney" a statement that plaintiff was an "unreconstructed, unreformable racist". A black former policeman, described as "Multnomah County's affirmative action director", is quoted as saying that plaintiff had a reputation for "using more than necessary force to arrest people, especially people of color and that he had a history of abusive and racist language, calling blacks names like 'nigger', 'coon', 'boy', or 'puke'". It attributes to an unidentified "black official of a civil rights organization" a statement that plaintiff was "bad news, straight out of

the Old West". The article also contains plaintiff's denials and favorable comments about plaintiff made by his superiors at the Portland Police Bureau.

Plaintiff brought this action, asserting two claims against defendant as a result of the article: first, that the article was libelous and, second, that it intentionally held plaintiff up to the public eye in a false light. Defendant moved to dismiss both claims. The trial court denied the motion to dismiss the libel claim and allowed the motion to dismiss the "false light" claim. Plaintiff's action then proceeded solely in libel.

Plaintiff requested production of documents by defendant, including notes of the reporter who wrote the allegedly defamatory article. Defendant moved for a protective order, relying on the Oregon Shield Law, and the court held defendant

need not produce the reporter's notes.

Defendant moved for summary judgment on the libel claim. In support of that motion it argued, in part, that: (1) plaintiff is a "public official" under New York Times v. Sullivan, 376 US 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), and, therefore, is required to show that defendant had acted with actual malice, i.e., that it had intentionally or recklessly published defamatory falsehoods concerning plaintiff; and (2) defendant had not, in fact, acted knowingly or recklessly. Plaintiff responded to defendant's motion by submitting affidavits and excerpts from depositions of defendant's sources for the article. He did not concede that he he was a "public official" within the purview of the New York Times rule; however, his principal contention was that the facts warranted submission of the case to a jury

even under the New York Times standard.

In opposing defendant's motion for summary judgment, plaintiff produced evidence of the following facts:

(1) That the statements made about him by defendant explicitly stating or implying that he was a racist were false, and without factual foundation (Affidavit of John McNabb, at 4);

(2) That defendant had absolutely no first hand sources for its article about plaintiff (see Deposition of Bob Phillips, at 14, 28-29; Deposition of Norman Monroe, at 14-15; Deposition of Charles Merten, Part 2, at 8);

(3) That defendant's investigation of plaintiff was inadequate, not only given the lack of first hand sources, but given its lack of an effort to follow up on information which it received (See Deposition of Julie Tripp, at 76; Deposition of Charles Merten, at 27, 28);

(4) That defendant possessed definite information from one source that the contents of its publication were false (See Deposition of John Roe, at 25). Defendant neglected to publish this information;

(5) That defendant possessed information from yet another source which indicated that the source, who was quoted as describing plaintiff derogatorily in defendant's article, was in fact describing an individual other than plaintiff. Defendant failed to note this fact in its article, and failed to follow up on the possibility that the source was describing another police officer (Deposition of Bob Phillips, at 27, Affidavit of John McNabb, at 8);

(6) That there was absolutely no urgency concerning the publication of the article about plaintiff, especially given the fact that some of the sources for the

article were purportedly describing their knowledge of plaintiff dated more than 10 years ago (Deposition of Charles Merten, Part 2, at 28-42); and

(7) Defendant failed, not only with its interview with plaintiff, but with its failure to interview those under whose direct supervision plaintiff had been in the Portland Police Bureau, to verify the questionable and extremely serious charges against plaintiff it was publishing (Affidavits of Richard Walker and Robert Roberts, at 1; Affidavit of John McNabb, at 8).

Federal Question Raised

Defendant raised the first federal question in this case by moving for summary judgment and relying on its First Amendment privilege as set forth in New York Times v. Sullivan, supra. The trial court passed on the first amendment

summary judgment question in its order and judgment of May 20, 1982. That order granted summary judgment for defendant and concluded, in relevant part, as follows:

> "1. The plaintiff is a 'public official' within the meaning of that term as used in New York Times v. Sullivan, 376 US 254 (1964). Among the elements which the plaintiff must prove to establish his claim are that the defendant's publication was false and that it was made "with 'actual malice'" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (Id. at 279-280).
>
> "2. The plaintiff, when challenged by the defendant's motion for summary judgment and supporting evidence, failed to present 'specific facts' (ORCP 47D) sufficient to show a genuine issue of fact material to disposition of this case.
>
> "3. The plaintiff failed to make a showing in conformity with the New York Times doctrine that the defendant acted with knowledge of falsity or with reckless disregard for the truth.
>
> "4. The statements in defendant's publication upon which the plaintiff rests his claim are couched in language of apparency, are not presented as the views of the defendant, and, viewed in the context of the publication as a whole, are

> protected expressions of opinion. King v. Menolascino, 276 Or 501, 555 P.2d 442 (1976).
>
> "5. The defendant's publication was a neutral and balanced report of the views of prominent persons concerning a public figure on a matter of public importance, and accordingly the plaintiff's claim is constitutionally barred. E.g., Edwards v. National Audubon Society, Inc., 556 F.2d 113 (2d Cir. 1977). cert. denied, 434 U.S. 1002 (1977)."

Trial Court's Order of May 20, 1982.

The trial court entered judgment for defendant on the merits of plaintiff's claim, and plaintiff appealed to the Oregon Court of Appeals. The first amendment summary judgment issue was properly preserved in the Oregon Court of Appeals and Oregon Supreme Court.

Plaintiff raised the first amendment-shield law issue in the trial court by moving for an order requiring defendant to produce the reporter's notes used in preparing the article at issue in this case. The trial court passed on the issue

by denying plaintiff's motion as follows:

> "On September 16, 1981, in a hearing before the Honorable Charles S. Crookham, Presiding Judge of the above-entitled court, the plaintiff moved for an order requiring the defendant to produce all of Julie Tripp's notes described in plaintiff's Notice of Deposition of Julie Tripp. After hearing oral argument Judge Crookham requested the defendant to submit the notes of Julie Tripp to the court for in camera inspection. The defendant submitted the notes to the court and both parties submitted memoranda. The plaintiff was represented by William B. Aitchison and the defendant was represented by David H. Wilson, Jr., one of its attorneys. The court being fully advised,
>
> "IT IS HEREBY ORDERED that plaintiff's motion is denied."

Order of December 18, 1981.

Plaintiff raised the issue again by filing a motion to compel the reporter to answer questions on deposition, which the court denied as follows:

> "Plaintiff's motion to compel discovery (answers to questions in the deposition of Julie Tripp) came on for regularly scheduled hearing before the Honorable Charles S. Crookham, Presiding Judge of the above-entitled court on Monday, April

> 6, 1982, at 9:30 a.m. Plaintiff was represented by Will Aitchison, his attorney, and defendant was represented by David H. Wilson, Jr., one of its attorneys. The court being fully advised,
>
> "IT IS HEREBY ORDERED that plaintiff's motion to compel discovery is denied."

Order of April 16, 1982.

The trial court's refusal to order discovery of documents or answers to questions on deposition was assigned as error on appeal and argued both to the Court of Appeals and the Oregon Supreme Court.

REASONS FOR GRANTING THE WRIT

The Oregon Courts have decided an important question of federal law which has not been, but should be, settled by this Court.

In Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), the trial court had granted a summary judgment for defendant on two grounds, one of which was that plaintiff had failed to produce sufficient evidence of "actual

malice" to justify jury trial. The trial court had stated that, on the issue of "actual malice" under New York Times v. Sullivan, "summary judgment might well be the rule rather than the exception". 443 U.S. at 120.

Hutchinson was decided on other grounds, and it was not necessary for this Court to rule on plaintiff's showing of malice. However, this Court said, in a footnote:

> "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called 'rule'. The proof of 'actual malice' calls a defendant's state of mind into question, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. See 10 C. Wright & A. Miller, Federal Practice and Procedure Section 2730, pp. 590-592 (1973). C. F. Herbert V. Lando, 441 U.S. 153 (1979)."

443 U.S. at 120 n. 9.

This case presents the question left undecided in Hutchinson. As discussed below, there is substantial conflict among

the circuits and among state courts as to the proper standard to apply to summary judgment on the issue of malice in Sullivan cases. That uncertainty adversely affects both the news media in their publication decisions and defamation plaintiffs in their decisions as to whether to file lawsuits. This is an appropriate case in which to resolve that confusion, conflict and uncertainty.

> There is substantial conflict among the federal circuits and among the state courts as to the evaluation on summary judgment of "actual malice" in **Sullivan** cases.

The federal circuits have adopted widely divergent views as to what evidence of "actual malice" a public official plaintiff must show to defeat a publisher's motion for summary judgment under Sullivan. In Washington Post Co. v. Keogh, 365 F.2d 965 (DC Cir. 1966), cert. denied, 385 U.S. 1011 (1967), the court suggested that summary judgment should be

granted liberally in such cases. Judge Wright's opinion in Keogh was followed by his concurrence in Wasserman v. Time, Inc., 424 F.2d 920, 922 (DC Cir.) (Wright, J. concurring), cert. denied, 398 U.S. 940 (1970). In that concurrence, Judge Wright said the trial court evaluating a motion for summary judgment should make its own determinations as to credibility of witnesses and should draw its own inferences rather than drawing all inferences in favor of the party moved against, as is normally required on summary judgment. 424 F.2d at 922.

The Ninth Circuit Court of Appeals has explicitly rejected this view of Sullivan summary judgment in Guam Federation of Teachers Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.) cert. denied, 419 U.S. 872 (1974).

The Oregon courts in this case have apparently, though not explicitly, adopted

Judge Wright's view and evaluated the evidence for themselves. Given the showing made by plaintiff, the court cannot possibly have drawn every inference in plaintiff's favor. Clearly, a reasonable jury could infer that plaintiff had demonstrated actual malice within the meaning of Sullivan where plaintiff showed defendant had made false statements without consulting any first hand sources or plaintiff's immediate superiors, had failed to print or follow up on favorable information in its possession, and knew there was absolutely no urgency to its publication in that the vast bulk of the information printed was years old.

Certiorari should be granted to resolve the conflict among federal circuits and among state courts as to the showing of "actual malice" required to defeat a motion for summary judgment in

Sullivan cases. 1/

"SHIELD LAW"

> The Oregon courts have decided an important question of federal law which has not been, but should be, settled by this Court.

The Oregon courts in this case have held that, under New York Times v. Sullivan, supra, and the Oregon Shield Law, a defamation plaintiff may be required to prove "actual malice" as the defendant's state of mind, but denied access to the very evidence which can

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1/ Other cases applying normal or near-normal summary judgment standards to Sullivan cases included Clark v. American Broadcasting Companies, Inc., 684 F.2d 1208 (6th Cir. 1982); Shultz v. Newsweek, Inc., 668 F.2d 911 (6th Cir. 1982); Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir. 1981); Yiamouyiannis v. Consumers Union, 619 F.2d 932 (2nd Cir. 1980). Cases applying the augmented standard included Jenoff v. Hearst Corp., 453 F. Supp 541 (DMd. 1978); Guiffar v. Westinghouse Electric Corp., 396 F. Supp 1042 (SDNY 1975); Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir. 1979); Truetler v. Meredith Corp., 455 F.2d 255 (8th Cir. 1972).

prove that state of mind -- the reporter's notes and testimony as to steps taken and not taken to ensure the accuracy of the published material.

As plaintiff contended below, defendant cannot have it both ways. By raising the protection of Sullivan, defendant requires plaintiff to prove "actual malice". This puts defendant's state of mind in issue. If defendant chooses to do this, it cannot then be allowed to rely on a state shield law to protect it from disclosure of evidence of that state of mind. This Court should not allow a defendant to hide behind the first amendment while using a state shield law to deprive plaintiff of the means of penetrating that protection.

Certiorari should be granted to clarify the application of New York Times v. Sullivan where defendant publisher relies on a state shield law.

CONCLUSION

Many courts, including the Oregon courts below, have made summary judgment the rule rather than the exception where actual malice is the question in New York Times v. Sullivan cases. While this Court has not decided that question, it has stated its doubts as to such a revised rule of summary judgment. This case is a proper vehicle in which to make clear the standards which apply to motions for summary judgment in such cases. Further, the scope of Sullivan should be clarified as it applies to cases in which defendants rely on state shield laws. The petition for certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX TO

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

APPENDIX INDEX

Page

APPENDIX A
Judgement and Order granting Defendant's Motion for Summary Judgment, dated May 20, 1982, Circuit Court for the State of Oregon, County of Multnomah 2a,4a

APPENDIX B
Decision of the Court of Appeals for State of Oregon, affirming Order granting summary judgment, dated July 11, 1984 . . . . . 9a

APPENDIX C
Order of the Supreme Court of the State of Oregon denying Petition for Review, dated September 18, 1984 . . . . . 31a

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JOHN McNABB,)
)
Plaintiff,)
)
vs.)
)
OREGONIAN PUBLISHING CO.,)
)
Defendant.)

No. A8107-04235

JUDGMENT

Judgment docketed May 24, 1982

The court having granted defendant's motion for summary judgment, now, therefore, it is hereby

ORDERED AND ADJUDGED that this action is dismissed on the merits, and that the plaintiff have and recover nothing from the defendant, and that the defendant have judgment against the plaintiff for recovery of defendant's costs and disbursements incurred in this action taxed at $

DATED at Portland, Oregon this 20th

day of May, 1982.

James D. Case, Circuit Court
Judge, Pro Tempore

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JOHN McNABB,)
)
Plaintiff,)
)
vs.)
)
OREGONIAN PUBLISHING CO.,)
)
Defendant.)

No. A8107-04235

ORDER

Received, Circuit Court, Multnomah County, 1982, May 20, PM 3:08

On May 10, 1982, there came on for regularly scheduled hearing, before the undersigned judge of the above-entitled court, the defendant's motion for summary judgment in the above-captioned case. Plaintiff was represented by Will Aitchison, his attorney, and defendant was represented by David H. Wilson, Jr. and Michael G. Holmes, of defendant's attorneys. The court considered the briefs and supporting materials filed by

the parties and heard oral arguments presented by counsel for both parties. After the conclusion of the oral arguments, the court announced its decision and reasons therefor and declared that the defendant's motion for summary judgment is granted. Accordingly, the court hereby concludes and orders as follows:

The court concludes:

1. The plaintiff is a "public official" within the meaning of that term as used in New York Times v. Sullivan, 376 US 254 (1964). Among the elements which the plaintiff must prove to establish his claim are that the defendant's publication was false and that it was made "with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (Id. at 279-280).

2. The plaintiff, when challenged by the defendant's motion for summary

judgment and supporting evidence, failed to present "specific facts" (ORCP 47 D) sufficient to show a genuine issue of fact material to disposition of this case.

3. The plaintiff failed to make a showing in conformity with the New York Times doctrine that the defendant acted with knowledge or with reckless disregard for the truth.

4. The statements in the defendant's publication upon which the plaintiff rests his claim are couched in language of apparency, are not presented as the views of the defendant, and, viewed in the context of the publication as a whole, are protected expressions of opinion. King v. Menolascino, 276 Or 501, 555 P2d 442 (1976).

5. The defendant's publication was a neutral and balanced report of the views of prominent persons concerning a public figure on a matter of public importance,

and accordingly the plaintiff's claim is constitutionally barred. E.g., Edwards v. National Audubon Society, Inc., 556 F2d 113 (2nd Cir 1977), cert. denied 434 US 1002 (1977).

6. There is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law on each of the grounds described above.

7. The court does not rule on the question whether the plaintiff complied with the Oregon retraction statute (ORS 30.160 - 30.165) or on whether an absolute privilege should be recognized for speech relating to a public official.

NOW, THEREFORE, the court hereby

ORDERS that the defendant is entitled to judgment dismissing this action in its entirety with prejudice and judgment for recovery by the defendant of its costs and disbursements in this action.

DATED this 20th day of May, 1982.

James D. Case, Circuit Court
Judge Pro Tempore

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN McNABB,

Appellant,

v.

OREGONIAN PUBLISHING CO.,

Respondent.

(A8107-04235; CA A24962)

Appeal from Circuit Court, Multnomah County.

James D. Case, Judge Pro Tempore.

Argued and submitted February 25, 1983.

Will Aitchison, Portland, argued the cause for appellant. With him on the brief was Aitchison & Sherwood, P.C., Portland.

David H. Wilson, Jr., Portland, argued the cause for respondent. With him on the brief were Michael G. Holmes and Spears, Lubersky, Campbell & Bledsoe, Portland.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J.

Affirmed.

GMCNAB.2 FILED: July 11, 1984.

COSTS SHEET

Case Name: McNabb v. Oregon Publishing Co.

Court of Appeals Case Number: A24962

Trial Court or Agency Case Number: A8107-04235

The prevailing party is: respondent.

( ) No costs are awarded.

(x) Costs are awarded to the prevailing party. The party responsible for paying costs is appellant.

****

The following entries will be made as appropriate at the time that the appellate court decision is enforceable. Attorneys see Rule 11.03, 11.05 and 11.10.

It is therefore ordered that the prevailing party(ies) recover(s) from

_____

_____

costs and disbursements on appeal taxed at $_____, and the further sum $_____ as attorney fees.

The Supreme Court denied petition for review on _____

Date appellate court decision is enforceable:_____

WARDEN, J.

Plaintiff, a Portland police officer, brought this action to recover for damage to his reputation caused by an allegedly libelous newspaper article that was published by defendant. The trial court entered summary judgment for defendant, and this appeal followed.

The alleged libel, published on May 31, 1981, was one of a series of articles that examined the workings of the Portland Police Bureau. The article includes quotations that portray plaintiff as a racist. It is prefaced by a summary statement that plaintiff is reputed to be a racial bigot inclined to using excessive force against blacks. It then reports a meeting between plaintiff, Portland City Commissioner Jordan and Portland Police Chief Baker, in which plaintiff was allegedly told by Commissioner Jordan that he was rumored to be "heavy handed" in his

work in the North Precinct and that he used "racially demeaning" language. It attributes to an unidentified "white Portland attorney" a statement that plaintiff was an "unreconstructed, unreformable racist." A black former policeman, described as "Multnomah County's affirmative action director," is quoted as saying that plaintiff had a reputation for "using more than necessary force to arrest people, especially people of color and that he had a history of abusive and racist language, calling blacks names like 'nigger,' 'coon,' 'boy', or 'puke.'" It attributes to an unidentified "black official of a civil rights organization" a statement that plaintiff was "bad news, straight out of the Old West." The article also contains plaintiff's denials and favorable comments about plaintiff made by his superiors at the Portland Police Bureau.

Plaintiff brought this action, asserting two claims against defendant as a result of the article: first, that the article was libelous and, second, that it intentionally held plaintiff up to the public eye in a false light. Defendant moved to dismiss both claims. The trial court denied the motion to dismiss the libel claim and allowed the motion to dismiss the "false light" claim. Plaintiff's action then proceeded solely in libel.

While the case was pending, plaintiff sought discovery of certain notes taken by the reporter who wrote the article and a variety of material gathered by defendant about Plaintiff which was not included in the final draft of the article. The trial court, relying on Oregon's "shield law," ORS 44.510 to 44.530, held that the material was not discoverable.

Defendant then moved for summary

judgment on the libel claim. In support of that motion it argued, in part, that: (1) plaintiff is a "public official" under New York Times v. Sullivan, 376 US 254, 84 S Ct 710, 11 L Ed 2d 686 (1964), and, therefore, is required to show that defendant had acted with actual malice, i.e., that it had intentionally or recklessly published defamatory falsehoods concerning plaintiff; and (2) defendant had not, in fact, acted knowingly or recklessly. Plaintiff responded to defendant's motion by submitting affidavits and excerpts from depositions of defendant's sources for the article. He did not concede that he was a "public official" within the purview of the New York Times rule; however, his principal contention is that the facts warranted submission of the case to a jury even under the New York Times standard.

The trial court granted summary judgment, concluding, in part, that plain-

tiff is a "public official" and had not shown any evidence from which a jury could conclude that defendant had acted with actual malice.

Plaintiff assigns three errors on appeal. First, he contends that the trial court erred by granting summary judgment. Second, he contends that the trial court erred in dismissing his "false light in the public eye" claim. Finally, he contends that the trial court erred in failing to require defendant either to produce material that plaintiff requested during discovery or to abandon the claim that it was entitled to the protection of the New York Times rule.

As a preliminary matter, we agree with the trial court that, as a police officer, plaintiff is a public official. 1 The nature and importance of the subject matter of the allegedly defamatory article published by defendant demonstrate that

plaintiff's duties are governmental in character and that there is significant public interest in the manner in which those duties are discharged. See Koch v. Laborico, 66 Or App 78, 674 P2d 602 (1983), rev den 296 Or 712 (1984); Coursey v. Greater Niles Township Pub. Corp., 40 Ill 2d 257, 264-65, 239 NE2d 837 (1968); Rawlins v. Hutchinson Publishing Co., 218 Kan 295, 299, 543 P2d 988 (1975); Malerba v. Newsday, Inc., 64 App Div 2d 623, 624, 406 NYS2d 552 (1978).

The question in the present case is whether, based on the affidavits and depositions in the record, allowing all permissible inferences and resolving questions of credibility in plaintiff's favor, a reasonable jury could find actual malice? See Yartzoff v. Democrat-Herald Pub. Co., 281 Or 651, 655, 576 P2d 356 (1978); Koch v. Laborico, supra, 66 Or App at 86. Malice may be established by evi-

dence that a statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not," New York Times v. Sullivan, supra, 376 US at 279-80, or "with (a) high degree of awareness of (its) probable falsity," Garrison v. Louisiana, 379 US 64, 74, 85 S Ct 209, 13 L Ed 2d 125 (1964), or when "the defendant in fact entertained serious doubts as to the truth of (its) publication." St. Amant v. Thompson, 390 US 727, 731, 88 S Ct 1323, 20 L Ed 2d 262 (1968).

A public official who claims to have been libeled must prove the existence of actual malice by "clear and convincing proof." Gertz v. Welch, 418 US 323, 342, 94 S Ct 2997, 41 L Ed 789 (1974). Actual malice is not presumed, New York Times v. Sullivan, supra, 376 US at 284. Neither may it be inferred from the fact of defamatory publication alone, Nader v. de

Toledano, supra, 408 A2d at 41, or from the mere fact that the accusations are of a serious nature. Washington Post Co. v. Keogh, 365 F2d 965, 970 (DC Cir 1966), cert den 385 US 1011 (1967).

Furthermore, plaintiffs' allegations in actions for libel that defendants "rel(ied) on statements made by a single source," New York Times Company v. Connor, 365 F2d 567, 576 (5th Cir 1966), or failed to verify statements received from an "adequate news source," Post v. Oregonian Publishing Co., 268 Or 214, 224, 519 P2d 1258 (1974), or performed "slipshod investigation," Colombo v. Times-Argus Ass'n., Inc., 135 Vt 454, 458, 380 A2d 80 (1977), have all been rejected as bases for inferring actual malice. In short, reckless conduct amounting to actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St.

Amant v. Thompson, supra, 390 US at 731. Rather, "'knowledge' or "reckless disregard' is a subjective matter, a question of state of mind, quite distinct from any question of objective reasonableness or prudence." Nat. Ass'n., Etc. v. Central Broadcasting, 379 Mass 220, 231, 396 NE2d 996, (1979), cert den 446 US 935 (1980).

Plaintiff's contention that the trial court erred in granting summary judgment is grounded primarily on the argument that the serious nature of the charges alleged demanded, but defendant failed to conduct, a thorough investigation as to their accuracy. In support, plaintiff asserts: (1) defendant failed to obtain first hand information about plaintiff; (2) the absence of "hot news" demanded a more thorough investigation than was performed by defendant; (3) defendant possessed unpublished contradictory information about plaintiff, and it either should have

published that information or refrained from publishing what it did; and (4) defendant failed to pursue potentially exculpatory information about plaintiff.

First, as we have stated, malice may not be inferred from the fact that the accusations are of a serious nature, Washington Post Co. v. Keough, supra, 365 F2d at 970, or from a defendant's "slipshod investigation." Colombo v. Times-Argus Ass'n., Inc., supra, 135 Vt at 458. Second, although some courts have considered "hot news," i.e., the immediateness of a story, as a factor in determining actual malice, see, e.g., Curtis Publishing Co. v. Butts, 388 US 130, 157, 87 S Ct 1795, 18 L Ed2d 1094 (1967); Durso v. Lyle Stuart, Inc., 33 Ill App 3d 300, 305, 337 NE2d 443 (1975), no court has held that actual malice may be inferred solely from the fact that a poorly investigated, defamatory article was

not "hot news." Third, plaintiff's assertion that defendant possessed contradictory information about plaintiff is based on statements made by John Roe, who had been one of plaintiff's supervisor's in the late 1960's, that plaintiff "is not a racist." 2 Several courts have concluded that a media defendant's possession of contradictory information that has come from the plaintiff public official or his supervisors provides little support for an inference of actual malice. See Edwards v. National Audubon Society, Inc., 556 F2d 113 (2nd Cir), cert den 434 US 1002 (1977), and Dupler v. Mansfield Journal Co., 64 Ohio St 2d 116, 413 NE2d 1187 (1980), cert den 452 US 962 (1981).

Finally, plaintiff asserts that actual malice may be inferred from defendant's failure to follow up on potentially exculpatory information concerning him. Plaintiff excerpts a portion of the

deposition of one of defendant's sources, who testified that he described plaintiff to defendant's reporter as a "young officer with red hair * * * who was well-versed in karate." Plaintiff refers to his affidavit, in which he states that he does not have, nor has he ever had, red hair, and that he has only a faint acquaintance with the martial arts, acquired during his experience in the Army between 1962 and 1964, and forgotten soon thereafter.

When a plaintiff in a libel action has shown that the defendant possesses contradictory information, or that for some reason the defendant had serious doubt as to the trustworthiness of the source of its information, some courts have been willing to infer actual malice. See, e.g., Widener v. Pacific Gas & Electric Co., 75 Cal App 3d 415, 142 Cal Rptr 304 (1977), cert den 436 US 918

(1978); Fopay v. Noveroske, 31 Ill App 3d 182, 334 NE2d 79 (1975); Wollman v. Graff, supra. Here, however, plaintiff has made no showing that defendant knew that plaintiff does not have red hair or that he did not practice martial arts. Absent a showing of facts demonstrating knowledge from which malice may be inferred, plaintiff's final argument is, at best, grounded in defendant's investigatory failure, and we reject investigatory failure as a sole ground for inferring malice. See Columbo v. Times-Argus Ass'n., Inc., supra, 135 Vt at 458.

Summary judgment was appropriately granted on the libel claim, because plaintiff failed to show from the affidavits and depositions in the records any material issue of fact from which a reasonable jury could find actual malice.

Plaintiff's second assignment of error is that the trial court erred in

dismissing his second claim for relief on the ground that the tort of "false light in the public eye" does not exist in Oregon. Assuming that the tort exists in Oregon, see Flowers v. Bank of America, 67 Or App 791, 679 P2d 1385 (1984); Lee v. Nash, 65 Or App 538, 671 P2d 703 (1983), rev den 296 Or 253 (1984); and; Martinez v. Democrat-Herald Pub. Co., 64 Or App 690, 669 P2d 818, rev den 296 Or 120 (1983), the trial court did not err in dismissing the claim. Restatement (Second) Torts, Section 652E (1977) describes the tort:

> "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> "(a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> "(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

Subsection (b) requires that a plaintiff prove actual malice. Our holding that plaintiff failed to show actual malice in his libel claim also bars his "false light" claim.

In his final assignment, plaintiff contends that the trial court erred in failing to compel defendant either to produce certain material that plaintiff had requested during discovery or to abandon the New York Times v. Sullivan privilege. The trial court held that Oregon's "shield law," ORS 44.510-44.530, protects the requested material from discovery. Plaintiff sought: (1) the notes made by the reporter who wrote the article, (2) the names of one or possibly two unnamed persons interviewed by defendant in preparing the article and (3) the substance of defendant's interviews of each of its sources for the article, apart from what defendant printed in the

article.

ORS 44.520(1)(b) provides:

> "(1) No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise;
>
> "* * * * *
>
> "(b) Any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public."

ORS 44.530(3) provides that ORS 44.520 does not apply "with respect to the content or source of allegedly defamatory information" in civil actions for defamation when the defendant "asserts a defense based on the content or source of such information." The defense in this case was not based on the content or source of the unpublished information.

Plaintiff does not dispute that the information sought falls within the shield

law privilege. Instead, he contends that the trial court, by interposing the privilege, has prevented him from discovering anything other than the very substance of the article. He argues that the ruling has prohibited him from discovering matters indicating defendant's state of mind, matters that are essential to prove actual malice and, therefore, has limited his ability to pursue a defamation action. That may be so. However, except for constitutional limitations, to the extent that a state authorizes a claim for defamation, it may also limit a party's ability to prove the claim in order to promote other social purposes. 3 Plaintiff has made no state constitutional challenge, 4 and the trial court was not wrong in applying the statute in the face of the challenge that plaintiff made.

Affirmed.

FOOTNOTES

1

Plaintiff does not strenuously contest this holding. In his brief he states:

> "Plaintiff has not conceded that his is a 'public official' as that term is defined in Times. Plaintiff does acknowledge, however, that the vast majority of cases which have considered the issue have found even rank and file police officers to be public officials. Accordingly, in these proceedings, Plaintiff will not stress the argument that he is not a public official." (Emphasis supplied.)

2

Roe testified by deposition:

> "Q. Did (defendant's reporter) ask your permission to publish statements to the effect that you had no personal information that John McNabb was a racist?
>
> "A. She asked me that question.
>
> "Q. What question?
>
> "A. If in my opinion John McNabb was a racist, and I told her no.

"Q. Did she ask you if she could publish that?

"A. I don't recall. She may have. If she did, she didn't. I don't believe she did ask me. I just don't recall.

3

See Steaks Unlimited, Inc. v. Deaner, 623 F2d 264, 279 (3rd Cir 1980), upholding the application of Pennsylvania's shield law (which is similar to Oregon's) in a defamation case.

4

Article I, section 8, of the Oregon Constitution provides:

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Article I, section 10, of the Oregon Constitution provides:

"No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

IN THE SUPREME COURT OF THE STATE OF OREGON

MCNABB, JOHN
Petitioner

v.

OREGONIAN PUBLISHING CO
Respondent

ORDER DENYING REVIEW

CA A24962
SC S31003

The Court has considered the petition for review and ORDERS that it be denied.

DATE: September 18, 1984.

EDWIN J. PETERSON
CHIEF JUSTICE

COPIES TO:

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Office-Supreme Court, U.S.
FILED
JAN 21 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1064

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN McNABB,

Petitioner,

v.

OREGONIAN PUBLISHING CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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Table of Contents

I. The petition incorrectly portrays the record 1

II. There are not "special and important reasons" to grant a writ (Rule 17.1) 8

III. Conclusion 11

Table of Authorities

Cases

Koch v. Laborico, 66 Or App 78, 674 P2d 602 (1983) 11

New York Times Co. v. Sullivan, 376 US 254 (1964) . . . 6,9

St. Amant v. Thompson, 390 US 727 (1968) 6,9

Rule

Rule 17 of the Rules of the United States Supreme Court . 8,10

I. The petition incorrectly portrays the record.

The petitioner argues a distorted portrayal of the record, in the petitioner's statement of questions presented and elsewhere in the petition.

A. The record shows the following among the undisputed facts. An experienced newspaper reporter conducted an investigation for weeks and composed an article upon this police sergeant's reputation in the black "community." On the allegedly defamatory statements in the article, the reporter had as sources seven independent persons. Each of the sources deposed by petitioner testified that the reporter quoted him accurately. All of the sources were persons of stature and responsibility and were well acquainted with police-black relations in the community. (1) One is a lawyer who has had

years of experience in representing blacks in civil rights matters in Portland, previously as a Legal Aid attorney in the Albina area office, and later in private practice. He had been an attorney for plaintiffs in a suit in which this petitioner and other police officers were charged with using excessive force against blacks, and in which a consent decree was entered against the police. (The reporter also examined the court file of that case.) (2) Another of the sources was a Portland police officer in some of the same years as the petitioner has been, and this source had been one of the police bureau's Community Relations Officers in the subject community (Albina); also he founded the Albina Youth Opportunity School, and was the Director of the Youth Services Division of the City of Portland for several years. When interviewed this source was the Affirmative

Action Officer of the county (Multnomah) and was a member of the Internal Affairs Task Force created by the police commissioner to investigate handling of citizen complaints against police. (3) A third source had been a Portland police sergeant and an immediate supervisor of the petitioner, and for a time was the police bureau's Community Relations Officer in the Albina area. (4) A fourth source had been the Administrative Assistant to the Portland Chief of Police and had served as the police bureau's liaison with the mayor's office. When interviewed he was (and had been for some years) the Deputy Director of the Portland Chapter of the Urban League. (5) A fifth source was then (and had been since 1975) the Chairman of the Greater Northeast Precinct Police Council, an advisory group of citizens and police which met monthly to hear

complaints against police in the precinct including Albina. Also when interviewed he was Deputy Director of Affirmative Action under the Governor of Oregon. (6) A sixth source had been a police officer assigned to the Albina area during some years when the petitioner worked there, and had been a police Community Relations Officer in that area. (7) The seventh source was then (and had been since 1976) the City Commissioner having charge of the Portland Police Bureau.

There is no evidence that the reporter must have doubted the veracity of these persons. In addition to their credentials and experience there is the fact that three of them previously had been reliable sources to the defendant.

The statements that each of those persons made regarding the petitioner corroborated the others. In addition,

the reporter learned other facts that corroborated their statements.

In the reporter's deposition in this case, the reporter identified all sources of the allegedly defamatory statements. Counsel for the petitioner took unrestricted depositions of six of those source persons. (He omitted one of the seven because of ill health.) In the depositions the petitioner's counsel obtained at length from each of them the source person's description of the interviews with the reporter. The Oregon shield law did not prevent the petitioner from obtaining testimony from the sources on what the reporter asked or said and what they told the reporter.

B. The petition is misleading also in what it claims for evidence presented by petitioner or in suggesting that the petitioner's evidence should be deemed

legally sufficient (petition pages i-ii and 8-10). First, it must be remembered that the law does not permit an inference of actual malice from factual error (falsity), or from defamatory content of statements, or from a combination of those elements. E.g., New York Times Co. v. Sullivan, 376 US 254, 272-273, 288 (1964). Second, actual malice is not shown by proof that a defendant failed to investigate or failed to investigate far enough to discover "the truth." E.g., St. Amant v. Thompson, 390 US 727, 730, 731, 733 (1968); New York Times Co. v. Sullivan, supra, 376 US at 260, 261, 287-288. Third, the petitioner's descriptions of his evidence are exaggerated. For example, the deposition of source John Roe did not show that the "defendant possessed definite information . . . that the contents of its publication were false" (petition page 9).

Roe explained in his deposition that his answer to the reporter's question of whether he thought the petitioner was a racist was, "I don't have the information. 'I don't know whether he is or not,' is what it should have been. As far as I know, no." (John Roe Deposition at 34.) For another example, the petitioner's evidence did not show that anything signalled to the reporter a possibility that source Bob Phillips spoke of an officer other than the petitioner, because there was no evidence that the reporter knew that a part of Phillips' description did not fit the petitioner (if it did not fit). The court of appeals concisely disposed of the petitioner's defective assertion. Compare petition page 9 with petition appendix page 14a. Another example is that the petition wrongly avers that

the reporter made no attempt to question the petitioner's immediate supervisors (petition page ii). The record is clear that the reporter interviewed John Roe, who was an immediate supervisor of the petitioner. In addition the reporter interviewed the chief of police and the police commissioner.

II. <u>There are not "special and important" reasons to grant a writ (Rule 17.1).</u>

The Oregon Circuit Court and Court of Appeals decided on a conventional ground that the defendant is entitled to summary judgment. They applied the Oregon law on summary judgments, and determined that the petitioner had not presented specific facts sufficient to show a genuine issue of material fact on his assertion that defendant knew its publication was

false or published in reckless disregard of whether the publication was false. (Pages 4a-5a and 11a-15a of the appendix to the petition. The circuit court granted summary judgment on additional grounds, which the court of appeals did not need to reach.) The decisions below are consistent with St. Amant v. Thompson, 390 US 727 (1968), and New York Times Co. v. Sullivan, 376 US 254 (1964). Indeed, here the ruling for defendant was more strongly compelled, because the reporter investigated impressively. There was no investigation in St. Amant, supra, 390 US at 730, 733, or New York Times, supra, 376 US at 261, 288, and nevertheless the Court held that judgments must be entered for the defendants. Thus, in this case the court of appeals did not decide an important question of federal law which has not been decided

by this Court, and the decision of the court of appeals did not conflict with a decision of this Court or a federal court of appeals (Rule 17, Rules of the United States Supreme Court).

The petition fabricates and errs in arguing that the Oregon courts "have made summary judgment the rule . . . where actual malice is the question. . . ." (petition page 21). Obviously, the courts below did not hold or declare that summary judgment is "the rule" in actual malice suits. Furthermore, inconsistently with the petitioner's argument here, he argued to the Oregon Supreme Court (when he unsuccessfully applied for review) that the decision against him conflicted with a 1983 Oregon Court of Appeals decision which reversed a summary judgment against a plaintiff police officer in a libel suit, upon perceiving a genuine issue of

fact on actual malice (Koch v. Laborico, 66 Or App 78, 674 P2d 602 (1983), review denied 296 Or 712 (1984)). It is evident that different facts produced different results, and the Oregon Court of Appeals has not made summary judgment "the rule" in actual malice suits. In the present case the court of appeals decision is prosaic and does not have the doctrinaire character that the petition would ascribe to it.

III. Conclusion.

There are neither important nor suitable reasons for this Court to undertake review of the ordinary decision of the court of appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Michael G. Holmes,
Counsel for Respondent

(Respondent is a corporation owned either directly or through intermediate corporations by Advance Publications, Inc.)